IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3427 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 3427 of 1991
   Mr. DC Raval for MR MR ANAND for
   Petitioners.
   Mr. MA Bukhari, AGP for Respondent No. 1
   RULE SERVED for Respondent No. 2

CORAM : MR.JUSTICE K.A.PUJ

Date of decision: 07/02/2003

ORAL JUDGEMENT

The petitioners, in this petition, have challenged the orders dated 3-4-1991 (Annexures "I" collectively) and order dated 2-5-1991 (Annexure "K") on the ground that they were transferred from the Revenue

Department to other departments without their consent and while continuing their juniors in the original post and also ignoring the fact that the petitioners have passed the departmental examination of the Revenue Department and others who have been retained in the Revenue Department have not passed the requisite examination.

2. It is submitted in the petition that the petitioners were originally recruited as Junior Clerks in the year 1982. The petitioner No.1 was appointed to the post of Junior Clerk in the Revenue Department of Bhavnagar Collectorate in December 1982 and the petitioner No.2 was appointed in the same department of Jamnagar Collectorate in March 1982. The Clerks of the Revenue Department are required to pass sub-service departmental examination for confirmation. Both the petitioners have passed this examination within the prescribed chances and the prescribed time limit. The Clerks of the Revenue Department are further required to pass Lower Revenue Qualifying Examination. Both the petitioners have passed this examination within the prescribed chances and time limit.

3. It is further submitted that both the petitioners sought inter-district transfer to Panchmahals District and on their request, they were transferred on the condition that they became junior-most on the date of transfer in Panchmahals District. Both the petitioners were transferred to Panchmahals District under the authority of respondent No.2 on 15-2-1989 and 28-2-1989 respectively.

4. It was further submitted that by an order dated 28.11.1990, the respondent No.2 transferred the petitioner No.1 from the Revenue Department to the Office of Sub-Registrar and petitioner No.2 to the Education Department. It was further submitted that in the seniority list of Clerks working under the respondent No.2 authority showing the seniority as on 1-1-1990, the petitioners are at Sl. No. 211 and 212 respectively. The said list was having 219 persons and subsequently other Clerks were also recruited. The petitioners have further submitted that after the petitioners and others were transferred from Revenue Department to other departments, an order was passed on 31.3.1991 whereby several other persons were appointed as Clerks in the Revenue Department. In the said order dated 31.3.1991, the persons mentioned at Sr.No. 1to 8 are those persons who were originally in the Revenue Department but were transferred along with the petitioners. These 8 persons have passed the SSD examination but they have not passed

LRQ examination. It was further stated that one Kumari JR Dave who was at Sl. No. 6 who was junior to the petitioner in the Panchmahals District and that persons at Sl. No. 15 to 25 were fresh recruits in the Revenue Department. It was the grievance of the petitioners that the petitioners were not transferred back to the Revenue Department though their juniors were transferred back and some were continued even originally as reflected by the seniority list.

5. The petitioners have further submitted that they have therefore made representations to the respondent authority on 28.11.1990 and 31.1.1991 requesting them that they may be continued in the Revenue Department, however their request was turned down by reply dated 3-4-1991. The petitioner No.2 thereafter made one more representation on 5.4.1991 pointing out that there should be no question of transferring him out of Revenue Department especially when the posts in the Revenue Department were very much available. It was further pointed out in the said representation that he had passed the Revenue departmental examination and that he had already suffered a loss of seniority upon his transfer to Panchmahals District and he should not be subjected to further loss of seniority. This representation was also turned down by the respondent-authority by reply dated 2-5-1991.

6. It is these two letters rejecting the representation of the petitioners which are under challenge in this petition. This action of the respondent was challenged on the ground that they were thrown out of the cadre without their consent and even without consulting them. It was further challenged on the ground that the treatment given to them was in violation of Rule 17 of BCSR and also the action was discriminatory and arbitrary. The petitioners have further alleged that the action of the respondent authority was malafide as the transfers were for extraneous and improper considerations.

7. This Court has admitted the petition on 10.5.1991 and granted ad-interim relief in terms of Para 9 and the same was subsequently modified by this Court on 25.7.1991 to the effect that whatever seniority was fixed and whatever promotions were given as per the seniority list would be subject to the final outcome of this petition.

8. On Rule being served, the respondents have filed their appearance through Assistant Government Pleader and affidavit-in-reply was filed on 9.7.1991. It was stated

in the said affidavit-in-reply that the petitioners were transferred at their own request from their parent district to Panchmahals district in February 1989 and as per the conditions of transfer the petitioners were placed at the bottom of the seniority list of the Clerks in the Revenue Department. It was further stated that the comparison of date of passing examination could not be made between the petitioners and those who were originally in the Panchmahals District. It was also submitted that on and after 1.9.1990 the midday meal scheme which was operated by the Revenue department was discontinued and therefore the petitioners along with other persons working in the Revenue department were declared surplus. According to condition no.1 of the inter-district transfer order of the petitioners, they were to be treated junior-most and could be posted any where under the jurisdiction of the District Selection Committee and the District Collector. It was further submitted that if posts in the department in which the transferees were placed were abolished and the transferees, as a result thereof were declared surplus, the transferees were liable to be posted in any of the departments in any post to which the District Selection Committee was authorised to make appointment or to give a posting. It was, therefore, contended that since the petitioners were declared surplus as a result of stopping of midday meal scheme instead of sending home the petitioners, they were absorbed in the office of the Sub-Registrar and in the Education Department. It was further stated that by order dated 31-3-1991, new posts were created in the Revenue department but they were purely of temporary nature and were created only for the purpose of facilitating the work for the coming Lok Sabha elections. The said posts were also not as such created but had temporarily fallen vacant as certain Clerks working in the Revenue Department had been given temporary promotion to the post of Deputy Mamlatdars only for the Lok Sabha election work. The other allegations made by the petitioners in the petition were also denied in the affidavit-in-reply.

9. The petitioners have filed affidavit-in-rejoinder controverting the facts and averments made in the affidavit-in-reply. The petitioners have specifically reiterated that though the petitioners have passed the SSD and LRQ examinations, other employees who were declared surplus along with the petitioners were posted back to the Revenue Department for the work of Lok Sabha elections. The petitioners have also given the names of employees who were junior to the petitioners and who were declared surplus along with the petitioners and were

posted in Revenue department for the work of Lok Sabha elections.

10. Heard Mr. DC Raval, appearing for Mr. MR Anand, learned counsel for the petitioner and the learned AGP, Bukhari. It is emphatically stated on behalf of the petitioners that the petitioners were wrongly retained in the other departments especially when persons junior to them were brought back to the Revenue department. It was also stated that though the petitioners had passed two examinations and their names were ahead of other persons in the seniority list they were transferred to other departments and therefore the action of the respondent authorities was absolutely illegal and unlawful, and discriminatory coupled with malafide. It was also submitted that the representations were not considered by the respondent authorities in proper perspective and out of sheer prejudice towards the petitioners being Scheduled Tribes the representations were turned down by the respondent authorities. He has further relied on the decision of this Court in the case of Bhagwatiprasad Gordhandas Bhatt v. The State of Gujarat & Ors. (1977) 18 GLR 562, wherein it is held that the deputation and transfer basically differ from each other in that transfer can be only to an equivalent post in the same cadre; deputation may be in any other department where even equivalence may not have been determined. Transfer is right of the master and it is an incident of service and can only be challenged on the grounds of malafide or violation of statutory rule relating to transfer. The deputation can only be with the consent because the employee joined the department to render service in that department and he cannot be made to serve some where else may be in a post much lower to his post. If such power is to be considered, contract of service may degenerate into a contract of slavery because the slaves can be employed in any manner and for any work human or inhuman as the master or owner of the slave desires. On the basis of these observations, it is contended that since the petitioners were posted in some other departments their case was that of deputation and not of transfer and since no consent was obtained before deputing them to other departments, such action is required to be held as illegal and unlawful.

11. Mr. Bukhari, learned AGP, on the other hand, has supported the action of the authorities and contended that no illegality is committed by them and since the petitioners were junior-most in the seniority list in Panchmahals District they cannot claim their right to remain in the Revenue department or they should be

brought back prior to other persons. He has further submitted that at the time of seeking request transfer and at the time when the said request was accepted by the respondent authorities, it was made clear to the petitioners that they were supposed to work any where in Panchmahals district and that in the selection list their names were put at the bottom of that list. It was also made clear that the said request transfer was made subject to the conditions and rules and regulations framed by the State Government. Even while rejecting the representation dated 5-4-1991, the Collector, Panchmahals has made clear in his reply dated 2-5-1991 that in the order dated 14.12.1998 in respect of inter-district transfer, it was specifically stated that either on account of surplus or in absence of any vacancy the appointment would be made in any other office. Because of discontinuation of midday meal scheme, the petitioners have become surplus and hence they wee appointed in Sub-Registrar's office as well as in Education department. It was also made very clear that the appointment made in the Revenue department was only because of Lok Sabha elections and the said appointments were of only temporary nature. In this view of the matter, it was urged that the relief claimed by the petitioners in this petition should not be granted by this Court. He has further submitted that the decision of this Court relied upon by the petitioners is not applicable to the facts of the present case as here in the present case a request transfer was made and the petitioners were specifically informed that due to the circumstances mentioned therein if they are declared to be surplus they will have to work in any department. Hence the petitioners' case cannot be termed as the case of deputation.

12. I have considered the arguments canvassed by the learned Advocate for the petitioner and the learned Assistant Government Pleader for the respondents. I have also gone through the memo of the petition, documents and papers attached therewith, affidavit-in-reply filed on behalf of the respondents and the affidavit-in-rejoinder filed by the petitioner No.1. After having considered the arguments and submissions of the respective parties as well as their pleadings, I am of the view that the respondent authorities are not justified in not transferring the petitioners back to the Revenue Department on the basis of their seniority as per Seniority List prepared earlier. The petitioners are able to demonstrate that junior employees at Sr. No. 213 to 219 and those declared as surplus along with the petitioners who were juniors to the petitioners, were

posted back to the Revenue Department. It is also revealed from the fact that there were eight persons, juniors to the petitioners, who have passed only SSD Examination and posted back to the Revenue Department, while the petitioners who have passed L.R.Q. Examination were left out and not posted in the Revenue Department. I, therefore, found enough substance and merits in the submission of the petitioners, that the petitioners were subjected to discriminatory treatment which is violative of Articles 14 and 16 of the Constitution of India. When Court once having come to the conclusion that fundamental rights of the citizens are violated, the Court cannot turn its eyes and refuse to exercise its prerogative and extraordinary jurisdiction under Articles 226 and 227 of the Constitution of India. There is no logic in not bringing back the petitioners in the Revenue Department even for temporary period especially when juniors to the petitioners were brought back for the said purpose. I, therefore, see no justification in imparting the discriminatory treatment to the petitioners by not bringing them to the Revenue Department. I, therefore, gra
petition, after quashing and setting aside the order, action and/or decision taken by the respondents, vide letters dated 3.4.1991 and 2.5.1991 qua the petitioners.

13. This petition is accordingly disposed of. Rule made absolute with no order as to costs.

rmr. [K.A. Puj, J.]